92-213

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

WAYMAN HENRY CHUNN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner was deprived of liberty and property without due process of law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution, when, during his retrial before a Jury for criminal trespass at an abortion clinic in Harris County, Texas, the Trial Court changed the parameters of the retrial and surprised unfairly Petitioner's counsel – after Petitioner had testified and incriminated himself in the process – by refusing to instruct the Jury on the Texas statutory defense of necessity, *Tex. Penal Code*, § 9.22, the elements of which were established by the evidence, and whether the Court of Appeals erred in failing to understand and to correct such error;

2. Whether Petitioner was deprived of liberty and property without due process of law, in violation of such Due process Clause, when the Trial Court instructed the Jury to find him guilty of criminal trespass if it found that he, with the requisite intent, aided, etc. three unnamed juveniles to commit criminal trespass on the same date and at the same place, i.e., criminal responsibility for the acts of another under the law of parties in Texas, *Tex. Penal Code*, §§ 7.01, 7.02, but where no such theory of liability was alleged in the Information against him, and whether the Court of Appeals erred in failing to correct such error; and

3. Whether Petitioner was deprived of liberty and property without due process of law, in violation of such Due Process Clause, when the Trial Court, after a hearing, denied Petitioner's Motion To Quash Information No. 4,

QUESTIONS PRESENTED – Continued

filed the day before the retrial commenced and considered on the merits by the Trial Court and without objection by the State, which sought to quash the Information for failure to plead liability under such law of parties if the State intended to raise and support such a theory of liability (at the retrial), and whether the Court of Appeals erred in failing to correct such error.

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OPINION BELOW

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JURISDICTION

The Judgment of the Court of Appeals was rendered on December 19, 1991 (Pet. App. 8-9). The Court of appeals overruled Petitioner's timely-filed Motion for Rehearing on January 23, 1992 (Pet. App. 10). On May 6, 1992, the Court of Criminal Appeals of Texas refused Petitioner's timely-filed Petition for Discretionary Review (Pet. App. 11). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION:

Fourteenth Amendment:

> * * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * .

TEXAS STATUTORY LAW:

The *Texas Penal Code* provides, in pertinent part:

§ 7.01 *Parties to Offenses*

> (a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another

for which he is criminally responsible, or by both.

(b) Each party to an offense may be charged with commission of the offense.

(c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.

§ 7.02 *Criminal Responsibility for Conduct of Another*

(a) A person is criminally responsible for an offense committed by the conduct of another if:

* * *

(2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense;

* * *

STATEMENT OF THE CASE

After a retrial before a Jury in County Criminal Court at Law No. 4 of Harris County, Texas ("Trial Court"), Petitioner was found guilty of the offense of criminal trespass, a Class B misdemeanor under *Tex. Penal Code*, § 30.05, occurring allegedly on March 24, 1990, in Harris County, Texas (Tr. 4, 83).[1] A punishment phase proceeding was conducted before the same Jury. The Jury

[1] "Tr." refers to the Clerk's Transcript of documentary materials. "S.F." refers to the Court Reporter's Statement of

(Continued on following page)

assessed Petitioner's punishment at 24 days in jail and a fine of $1,000.00 (Tr. 85). He was sentenced in accordance therewith plus court costs (Tr. 89-90).[2] The pertinent facts are set forth below.

A. The Information. The Information alleged, in pertinent part, that, on or about March 24, 1990, in Harris County, Texas, Wayman Henry Chunn

> did then and there unlawfully[,] intentionally and knowingly enter and, after receiving notice to depart, remain on property owned by LESLIE MOORE, hereinafter styled the Complainant, without the effective consent of the Complainant. * * *

The Information did not charge Petitioner with criminal trespass for any involvement in possible criminal trespass offenses by three unnamed juveniles on the same date and at the same place.

B. The Mistrial. In October 1990, Petitioner was tried before a Jury, but the Trial Court granted Petitioner's motion for a mistrial after the Jury was unable to agree on a verdict. The Court had instructed the Jury (1) on the offense of criminal trespass, as charged against Petitioner; (2) on liability for criminal trespass under the law of parties (*Tex. Penal Code*, §§ 7.01, 7.02) relative to

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Facts or transcription of the proceedings in the Trial Court, of which there are four volumes.

[2] Petitioner did not apply for probation and the entire sentence is outstanding and unexecuted. Petitioner believes he is entitled to 40 days of jail time credit on his sentence, and, if the Judgment against him stands, would seek such credit from the Trial Court.

possible criminal trespass by three unnamed juveniles on the same date and involving the property of Leslie Moore and with certain possible intent and conduct by Petitioner in relation thereto; and (3) on the Texas statutory defense of necessity (*Tex. Penal Code*, § 9.22) as applied to Petitioner and such juveniles (Tr. 46-48).

C. Motion to Quash No. 4. On November 26, 1990, which was the day before the retrial commenced, Petitioner filed DEFENDANT'S MOTION TO QUASH INFORMATION NO. 4 which provided, in pertinent part (Tr. 56-57):

> II.
>
> The Information does not allege that Defendant was responsible criminally for the act(s) of another person(s) within the meaning of *Tex. Penal Code*, §§ 7.01, 7.02 ("such Theory of Liability"). Accordingly the State may not raise and support constitutionally such Theory of Liability at the forthcoming trial.
>
> III.
>
> If the State intends to raise and support such Theory of Liability, Defendant would object to said Information and move to quash it hereunder on the ground that it would deprive him of liberty and property without due process of law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution, since such Theory of liability is not alleged in said Information and Defendant would be entitled constitutionally to notice of what the State seeks to establish at the trial. Accordingly, Defendant requests the Court to ascertain before commencement of trial herein whether the State intends to raise and support such Theory of

> Liability and, if it does, Defendant would request the Court hereby to quash the Information as violative of the Due Process Clause of said 14th Amendment.

The State did not object to the timeliness of the Motion or to the hearing and determination of it by the Trial Court. After a pretrial hearing, the Court denied the Motion as follows (III S.F. 6):

> I do understand the motion. I will deny it. We have dealt with this issue a few times in the past. Up to this point in time, as I know the Texas law, they are not drawing a distinction in the pleadings here. There's no required pleading for the law of parties. Of course, this case has been tried before and everybody is aware of what the facts will be or anticipated facts will be. As such, the Motion to Quash No. 4 is denied.

D. Parameters of the Retrial. During the pretrial hearing on Motion To Quash 4 and other matters, the Trial Court said that the "rules remain the same" relative to motions from the prior proceeding (III S.F. 6). As for the defense of necessity, the following transpired relative to paragraphs 2 and 3 of a certain Motion in Limine submitted by the State (III S.F. 10-11):

> MR. SCHMUDE [Counsel for Petitioner]: Your Honor, construction of Paragraph 2 and 3 deals with the unborn life as the person involved, but not the defense of necessity for other forms of life.
>
> THE COURT: Exactly. For instance, if it's the kids on the property that day, you may have

> a justifiable need to, quote, "protect them" if the jury accepts that.

During the retrial, the Trial Court, during a bill of exceptions proceeding outside the presence of the Jury concerning defensive issues relative to the unborn, said, in pertinent part (IV S.F. 187):

> * * * I will allow, if the evidence raises it, a defense of third persons, or actually, necessity defense as to the juveniles who were on the property, if the evidence does raise it in the course of the trial.

Later in such proceeding, Counsel for Petitioner said, in pertinent part, "We all realize that there's another defensive issue vis-a-vis the teenagers" (III S.F. 192).

E. The Retrial. 1. Evidentiary Matters. a. On March 24, 1990, which was a Saturday, several persons, including some juveniles, entered the Women's Medical Center of Northwest Houston ("Clinic") where, among other things, abortions were performed. The building, including the hallway outside the Clinic, is owned in part by Dr. Robert Kaminsky of the Clinic (IV S.F. 57, 58). Petitioner entered the Clinic after he dropped off some passengers and parked his van (IV S.F. 178, 197, 199). Ms. Leslie Moore, a Clinic employee and the Complainant herein, saw them begin "passing around this black bar-looking thing" and, when she asked what they were doing, "they rushed toward the door where we were standing and [she] went inside the door and locked the [inside] door" (IV S.F. 9, 10, 12, 13, 21). Three juveniles locked themselves together by the neck with motorcycle or "titanium" bicycle locks (IV S.F. 15, 20-21, 67-68, 87, 156, 168). They were seated, back to back, and were blocking an area of

the Clinic "where the patients could not come and go through the back office" (IV S.F. 15, 67-68). The group was protesting abortions (at the Clinic). The police were called.

In the meantime, patients were escorted by Clinic personnel out of the front area of the Clinic, through an outside hallway, and around to the back (IV S.F. 13, 14, 15, 16, 69). Petitioner left the Clinic and went into a hallway of the building where he got into an argument or confrontation with the husband of a Clinic patient (IV S.F. 25, 29-33, 34-35). While Petitioner was in the hallway, Moore told him to leave the building (IV S.F. 14-17, 32-33, 42-43). She said that he was "harassing" the patients (in the hallway), and she informed "them" that he (Petitioner) "was trespassing, would he please leave" (IV S.F. 30-31). According to her, she told Petitioner that she had the authority to ask him to leave, and that he said that "he was waiting for the owner to ask him to leave" (IV S.F. 30, 31).

Miss Deania Reynolds, a Clinic employee, testified that she told the group, including Petitioner, to leave, and that they did not leave (IV S.F. 69-70). Deputy Sheriff Donald Sowell, the first officer on the scene, testified, in part, that he told Petitioner, who was inside the Clinic, to leave; that he did not leave; and that, when he asked them to step outside (the Clinic), Petitioner and some others complied and walked into the hallway (IV S.F. 89-93, 103-104). The teenagers who were locked together were requested by Officer Sowell to unlock themselves and leave the premises but they refused (IV S.F. 94). They were freed with a key obtained after "at least a couple of hours or more, possibly longer" (IV S.F. 93-96).

b. Three defense witnesses, who were inside the Clinic, testified that they did not hear anyone from the Clinic tell them to leave (IV S.F. 150, 169, 180). Two of them – Michael Barelis and Bruce Kuehn – testified that Officer Sowell never told them to leave (IV S.F. 151, 181). The third witness (Ms. Cheryl Park) testified that she did not see the sheriff come in, that he stayed in the hall (IV S.F. 169).

c. Petitioner testified in his own defense. On March 24, 1990, he drove to the Clinic with Mike Barelis, Bruce Kuehn "and there may have been some other people" (IV S.F. 197). The passengers got out of the van "and went to do whatever they were doing. And then [he] had to find a parking place that [he] thought was secured –" (IV S.F. 199). Petitioner entered the Clinic (after he parked the van). Neither Barelis, who was 14 years of age at that time, nor Kuehn, who was 23 years of age then, was locked inside the Clinic. The evidence is ambiguous as to whether the girl (per Kuehn, IV S.F. 183) or other person(s) (per Barelis, IV S.F. 160, 161, 162-163) transported by Petitioner was one of the three juveniles who were locked together inside the Clinic.[3]

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[3] The State's Attorney asked questions to Barelis about five persons inside the Clinic – Vicky, Bruce Kuehn, Amy Jocius, Anthony Morosky (phonetic spelling) and Jose Hernandez – and asked Barelis "were they (sic) any of these participants that I just named to you? [as to riding to the Clinic with Appellant]" (IV S.F. 160-162). Barelis answered "Yes" (IV S.F. 163). Kuehn was sure that the young lady passenger was not one of those who were locked (IV S.F. 183). Later, to the State's question, "Mr. Chunn, isn't it a fact that you drove one of the individuals who ultimately locked themselves up at the

(Continued on following page)

Petitioner was not told to leave while he was inside the Clinic (IV S.F. 204-206). He would have left if Officer Sowell had told him to leave (IV S.F. 207). While in the hallway, he was told by Moore to leave a certain person alone and to leave the building (S.F. 203). He told her that he would leave when the owner of the building asked him to leave, she said that she was the owner and he said that she was not (IV S.F. 202-203). He walked back to the lobby of the Clinic and went over to where the teenagers were locked up (S.F. 203). They were saying the rosary and he knelt down and continued saying the rosary with them until the arresting officer came (IV S.F. 203-204).

Petitioner did not plan this rescue mission (IV S.F. 198). He did not bring the bicycle locks to the Clinic, nor did he participate in the locking-up process, nor did he tell them to lock up or that type of thing (IV S.F. 200). He observed the locking process but did not try to stop them (from locking-up) (IV S.F. 200, 229).

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clinic; isn't that true?", Petitioner replied, "If I did, I don't know about it" (IV S.F. 224). When asked by the State's Attorney, "Well, you heard Mike Barelis testify this morning, didn't you?", Petitioner said, "Yes. I heard that and I heard you lead him into it and all he did was say yes or no. I don't think he realized what he said. You're the one that said it, not him" (IV S.F. 224-225). Shortly thereafter, Petitioner admitted that he heard Barelis testify that one of the three individuals who locked themselves up rode with him to the Clinic, but that he thought Barelis was mistaken (IV S.F. 225). Actually, Barelis did *not* so testify.

Petitioner's purpose or intention in entering the lobby of the Clinic that day was that he "hoped to prevent, if necessary, any harassment or abuse of the teenagers by the clinic personnel before the police arrived" (IV S.F. 214). This was based upon situations when people who were locked up at certain places were harassed or injured. One involved the dumping of a big potted plant and dirt on them by some "NOW women who were there to act as escorts" and, in another, the dumping of pitchers of ice water on them (IV S.F. 214-215). The first was "[a]t a rescue at the West Loop clinic * * * ", and the second "was at A to Z downtown" (IV S.F. 214-215). A third incident, involving urine, occurred after the instant case. If the teenagers were (to be) subjected to harm or ill treatment of that nature, Petitioner intended to "[p]revent them from doing so, to the best of my ability" (IV S.F. 215). "And probably they wouldn't [do so] just because of my presence" (IV S.F. 215). The following transpired (IV S.F. 215-216):

> Q. [MR. SCHMUDE] All right. Was that harm or danger imminent, as far as you could determine?
>
> A. I believed it was.
>
> Q. Wayman, do you feel that it was immediately necessary for you to do what you did in order to prevent that harm?
>
> A. Yes.
>
> Q. And then, lastly on this issue, Wayman, did you feel or believe that the desirability and urgency of avoiding that type of harm to the teenagers clearly outweighed, by reasonable standards, ordinary, reasonable

standards, the harm that the trespass law was designed to protect against?

A. I have always believed that protection of human life is infinitely more important than property rights.

Q. Would you say that the protection of these teenagers from this type of harm that you perceived outweighed clearly the harm that the trespass law was designed to prevent?

A. Yes.

2. **The Jury Instructions and Objections.** a. **The Defense of Necessity.** The Trial Court's proposed Instructions to the Jury included a charge on the defense of necessity which was the same charge the Court had given in Petitioner's first trial. Subsequently, the Trial Court removed the proposed charge on necessity and refused to instruct the Jury on that defense because Petitioner did not admit (commission) of the offense (IV S.F. 236-237). Counsel for Petitioner argued that the proposed charge on necessity should be included and, after substantial, unsuccessful argument, said that he was "extremely disappointed" and "I feel that the Defendant's due process rights under the Fourteenth Amendment have been and are being violated by the rule" (IV S.F. 245-246). The Court noted the objection.

b. **The Law of Parties.** The proposed instructions included a page 3 on the law of parties. The objection by Petitioner's Counsel and the Trial Court's ruling are as follows (IV S.F. 246-247):

MR. SCHMUDE: Your Honor, number one, we object to the entire Page 3 on the law of parties on the grounds, Judge, that the State did

not plead it in the information and, therefore, is not entitled to an instruction on that main case. In other words, if that's a theory that they are going in on for guilt, they have to plead it.

THE COURT: We dealt with the same issue on your defendant's Motion to Quash no. 4, which was denied. I do not believe that at the time the state of law requires an elemental pleading on the law of parties in order to submit it to the jury on a jury charge. As such, that objection will be overruled.

The instruction on parties, which was included in the Trial Court's Instructions to the Jury, reads as follows (Tr. 81):

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 24th day of March, 1990, in Harris County, Texas, three unnamed juveniles did unlawfully, without the effective consent of Leslie Moore, the owner, intentionally or knowingly enter and remain on property after receiving notice to depart, and that the defendant, WAYMAN HENRY CHUNN, did then and there, with intent to promote or assist the commission of the offense[,] solicit, encourage, aid or attempt to aid three unnamed juveniles in the aforementioned trespass, then you will find the defendant guilty.

> If you do not so find, or if you have a reasonable doubt thereof, then you will find the defendant not guilty under the law of parties.

F. **The Federal Questions.** The federal issue in Questions Presented 1, above, was raised and included in Petitioner's objection to the Trial Court's refusal to instruct the Jury on the defense of necessity (IV S.F. 243, 244-245; see *id.* 235-243, 246). This issue was in Point of Error No. 2 before the Court of Appeals, and the Court overruled such Point. It was in Ground Relied Upon for Rehearing No. 7 in Petitioner's Motion for Rehearing before the Court of Appeals and in Ground for Review No. 2 in Petitioner's Petition for Discretionary Review before the Court of Criminal Appeals. The Court of Appeals overruled the Motion for Rehearing, and the Court of Criminal Appeals refused said Petition.

The federal issue in Question Presented 2, above, was raised on appeal from the Trial Court's overrule of Petitioner's objection to the proposed instruction on the law of parties (IV S.F. 246-247). In so doing, the Trial Court said, in part, "We dealt with the same issue on your Defendant's Motion to Quash No. 4, which was denied" (*Ibid.*). This issue was in Point of Error No. 3 before the Court of Appeals, and the Court overruled such Point. It was in Ground Relied Upon for Rehearing No. 10 in such Motion for Rehearing and in Ground for Review No. 4 in said Petition. The Court of Appeals overruled the Motion for Rehearing, and the Court of Criminal Appeals refused said Petition.

The federal issue in Question Presented 3, above, was raised in Petitioner's Motion To Quash No. 4 which was denied by the Trial Court (Tr. 56-58; III S.F. 4-6). This issue

was in Point of error No. 5 before the Court of Appeals, and the Court overruled such Point. It was in Ground Relied Upon for Rehearing No. 13 in such Motion for Rehearing and in Ground for Review No. 6 in said Petition. The Court of Appeals overruled the Motion for Rehearing, and the Court of Criminal Appeals refused said Petition.

ARGUMENT

I.

DEPRIVATION OF 14TH AMENDMENT DUE PROCESS WHEN, AFTER THE EVIDENTIARY PHASE OF THE RETRIAL, THE TRIAL COURT CHANGED THE PARAMETERS OF THE RETRIAL AND SURPRISED COUNSEL FOR PETITIONER UNFAIRLY WITH ITS REFUSAL TO INSTRUCT THE JURY ON THE TEXAS STATUTORY DEFENSE OF NECESSITY

As shown on pp. 5-6, above, the rulings which the Trial Court made on motions in the first trial were to continue into the retrial, and the defense of necessity under Texas law relative to Petitioner's conduct and the juveniles was to be available to him if raised by the evidence. The elements of that defense were established through Petitioner's testimony. See *Tex. Penal Code*, § 9.22, and pp. 10-11, above.[4]

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[4] The Court of Appeals, however, disagrees on this in relation to a point of error not here involved (Appendix "A", pp. 2-3). While Petitioner believes that the Court of Appeals is incorrect and that the elements of the defense were established by evidence at the retrial, the instant claim of constitutional error stands regardless of the correctness of the conclusions reached by the Court of Appeals on such other point of error.

After the evidentiary phase of the trial, however, the Trial Court changed its position and refused to instruct the Jury on such defense. The Court based its action on the fact that Petitioner did not admit commission of the offense of criminal trespass.[5] However, *prior* to the commencement of Petitioner's testimony Petitioner's Counsel told the Court (during a proceeding outside the presence of the Jury on a bill of exceptions not here pertinent) (IV S.F. 191-192):

> Your Honor, *we are not admitting that he committed the offense of trespass.* We are admitting that he was there for a purpose and that would be developed through request (sic) and as when I put him on. That, however, if it turns out that a trespass, in fact, was committed, then, of course, he would be exonerated or justified under either of those defenses relative to unborn children. We all realize that there's another defensive issue vis-a-vis the teenagers. (Emphasis added.)

The Trial Court's backtracking came too late in the trial – to the unfair surprise of Petitioner's Counsel and

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[5] While there is support for this position at the intermediate appellate level in Texas – e.g., *Leach v. State*, 726 S.W. 2d 598, 600 (Tex. App. – Houston [14th Dist.] 1987, no pet.); *Trotty v. State*, 787 S.W. 2d 629, 630 (Tex. App. – Fort Worth 1980, no pet.) – the Court of Criminal Appeals has not so ruled and, in fact, has held that the defense of necessity is available where the defendant's testimony arguably could be considered as denying an element of the offense charged. *Thomas v. State*, 678 S.W. 2d 82, 84-85 (Tex. Crim. App., En Banc, 1984). In addition, § 9.22 makes no such requirement for availability of the defense. In any event, the instant claim of constitutional error stands regardless of how § 9.22 is interpreted by the Texas courts.

occuring *after* Petitioner had established the elements of such defense and had incriminated himself during his testimony.[6] See pp. 8-11, *supra*. This conduct was fundamentally unfair and prevented Petitioner from receiving a fair trial, in deprivation of his rights of liberty and property without due process of law, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution. It deprived Petitioner of the *very defense* which he had established testimonially, came after he had incriminated himself and resulted in unfair surprise to his Counsel. See *Lesinba v. California*, 314 U.S. 219, 236 (1941); *United States ex rel Means v. Solem*, 646 F. 2d 322, 331-332 (C.A. 8, 1980).

The Court of Appeals erred when it overruled Petitioner's point of error in such regard (Point of Error No. 2). In so doing, the Court *misstated* the contention as "appellant contends he was unfairly surprised because, in a prior trial of this case, the judge gave an instruction on necessity, but he denied one in this trial" (Appendix "A", p. 3). This action itself violated due process under said Amendment since it operated to deny Petitioner his right to a "fair opportunity" to secure a "meaningful appeal"

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[6] The Court of Appeals did not consider Petitioner's testimony as to what transpired in the hallway as admitting (commission of) the offense, stating "[t]here was no evidence the hallway was her [Moore's] property" (Appendix "A", p. 2). What the Court overlooked, however, was that the Jury was *permitted* to find that Moore was an "owner" of the hallway because the Jury Instructions provided, in part, that " 'Owner' means a person who has title to the property, possession of the property, whether lawful or not, *or a greater right to possession of the property than the defendant*" (Tr. 79). (Emphasis added.) See *Tex. Penal Code*, § 1.07(a)(24).

on the merits of such point of error. See *Evits v. Lucey*, 469 U.S. 387, 393-394, 400-405 (1985). The Court should have addressed this point of error in a forthright manner and sustained it on its merits.

II.

DEPRIVATION OF 14TH AMENDMENT DUE PROCESS WHEN THE TRIAL COURT INSTRUCTED THE JURY TO FIND PETITIONER GUILTY OF CRIMINAL TRESPASS IF IT FOUND, ETC. THAT HE MET CERTAIN REQUIREMENTS UNDER THE LAW OF PARTIES IN TEXAS AS APPLIED TO POSSIBLE CRIMINAL TRESPASS CONDUCT OF OTHERS FOR WHICH PETITIONER WAS NOT CHARGED IN THE INFORMATION

As shown on pp. 12-13, above, the Trial Court instructed the Jury to find Petitioner guilty of criminal trespass if it found beyond a reasonable doubt that three unnamed juveniles trespassed on the date and at the place in question, and that Petitioner, with the requisite intent, aided, etc. them so to do ("Instruction"). This operated to deprive Petitioner of liberty and property without due process of law, in violation of the Due Process Clause of said 14th Amendment, because Petitioner was *not* charged with liability for such *other* trespasses. See *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). "Conviction upon a charge not made would be a sheer denial of due process." *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937). As shown on p. 3, above, Petitioner was charged *only* with alleged trespass conduct *by him*. The Instruction was highly prejudicial in that the Jury could predicate guilt on

something which was not even charged in the Information. Since the Jury verdict was general (Tr. 83), the basis upon which guilt was determined is unknown.

The Court of Appeals misstated or understated this contention (contained in Point of Error No. 3) when it claimed that Petitioner "asserts the trial court erred by instructing the jury it could convict him under the law of parties because the information did not allege that he acted as a party" (Appendix "A", p. 3). Apart from such error of approach, the constitutional problem is grounded in the *absence* in the Information of the *theory of liability* which was being advanced to the Jury in the Instruction for guilt purposes. Under that Instruction, criminal trespass liability could attach to Petitioner based on his involvement in *other* possible criminal trespasses even though he was not so charged and, instead, was charged with a *different* criminal trespass offense, i.e., that by himself (Tr. 4). This theory of liability centered *not* on "the offense" under the law of parties, *Tex. Penal Code*, §§ 7.01, 7.02, charged against Petitioner (Tr. 4), but on possible *different* offenses of criminal trespass which the Jury may have found to have been committed on the same date and at the same place by three unnamed juveniles and with the requisite involvement by Petitioner.[7]

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[7] Actually, the theory of liability contained in the Instruction was a *misapplication* by the Trial court of the law of parties in Texas. In this regard, the law of parties concerns *"the offense"* charged and enables guilt to be established for *"the offense"* if the evidence shows certain involvement therein by the accused. *Tex. Penal Code*, §§ 7.01, 7.02. (Emphasis added.) For example, if A is charged with robbery of X, but the proof

(Continued on following page)

Any such offenses, however, would be *different*, individual offenses, with elements applicable to *each* of the three juveniles.[8]

III.

DEPRIVATION OF 14TH AMENDMENT DUE PROCESS WHEN THE TRIAL COURT DENIED PETITIONER'S MOTION TO QUASH INFORMATION NO. 4 DEALING WITH THE STATE'S FAILURE TO PLEAD LIABILITY OF PETITIONER FOR POSSIBLE CRIMINAL TRESPASS CONDUCT OF OTHERS

The Court of Appeals erred when it upheld the Trial Court's denial of Petitioner's Motion To Quash Information No. 4, pp. 4-5, above. This action was based on two grounds – untimeliness of the motion and the same reason for the Court's overrule of Point of Error No. 3 (the contention in Section II, above) – namely, that no allegation concerning parties was required. See Appendix "A", pp. 3-4.

As for untimeliness, the short answer is that the Court's position lacks vitality since the Trial Court resolved the Motion *on its merits* without any objection by

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(Continued from previous page)

establishes that A acted only as a lookout for B who, in turn, robbed X, A could be found guilty of robbery of X under the law of parties where the applicable requirements of § 7.02(a) were established beyond a reasonable doubt; and, in such scenario, criminal responsibility under such law need not be alleged in the charging instrument.

[8] There is nothing in the record to show that these juveniles were even charged with such criminal trespass offenses.

the State to the Motion or to such handling. Accordingly, the question of untimeliness was waived and cured.

On the merits, the Trial Court's denial of the Motion should not have been upheld since the State was required, by due process standards under the 14th Amendment to the U.S. Constitution, to plead the *bizarre* theory of liability which it intended to and did advance, namely, that Petitioner could be found guilty of criminal trespass, with which he was charged personally (Tr. 4), if the Jury found that he, with the requisite intent, aided, etc. three unnamed juveniles to commit *other* trespasses on the same date and at the same place (Tr. 81). The Trial Court knew or should have known that such a theory would be advanced by the State at the retrial (III S.F. 6) and, accordingly, should have granted the Motion and quashed the Information.

It is axiomatic that due process requires that an accused receive *notice* of that with which he will be confronted at trial. See *Cole v. Arkansas, supra,* 333 U.S. at 201; *De Jonge v. Oregon, supra,* 299 U.S. at 363. If the Trial Court had *not* given the Instruction, above, its denial of the Motion would not have carried the same weight of prejudice. But its giving of such Instruction compounded the prejudice stemming from such denial action, for the Court had *nothing* from the Information on which even to predicate such a *bizarre* Instruction. Accordingly, its denial action operated to deprive Petitioner of liberty and property without due process of law, in violation of the Due process Clause of said 14th Amendment (*Ibid.*), and the Court of Appeals erred by failing to correct such error.

CONCLUSION

For the reasons and authorities set forth, it is submitted respectfully that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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P.O. Box 674
Tomball, Texas 77377-0674
(713) 376-0277
Attorney of Record for Petitioner

APPENDIX "A"

Judgment affirmed and Opinion filed December 19, 1991

[SEAL]

In The

COURT OF APPEALS

For The

FIRST DISTRICT OF TEXAS

NO. 01-90-01120-CR

WAYMAN HENRY CHUNN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law Number 4
Harris County, Texas
Trial Court Cause No. 9011667

OPINION

A jury found appellant guilty of criminal trespass and assessed punishment at a fine of $1,000.00 and 24 days in jail.

The first point of error contends the trial court erred by not instructing the jury on the defense of necessity. TEX. PENAL CODE ANN. § 9.22 (Vernon 1974). Appellant and

three juveniles trespassed at a medical clinic that performed abortions. Appellant contends his trespass was necessary to defend the other trespassers from attack by people in the clinic.

This point of error is without merit for two reasons. First, appellant did not admit at trial that he committed criminal trespass. Rather, he claimed he did not commit criminal trespass, but if he did, he should be acquitted because he acted out of necessity.

A defendant is not entitled to a jury instruction on the defense of necessity unless he admits the offense. *Vasquez v. State*, 796 S.W.2d 555, 559 (Tex. App. – Houston [1st Dist.] 1990, pet. granted); *accord Trotty v. State*, 787 S.W.2d 629, 630 (Tex. App. – Fort Worth 1990, pet. ref'd); *Leach v. State*, 726 S.W.2d 598, 600 (Tex. App. – Houston [14th Dist.] 1987, no pet.); *Pentycuff v. State*, 680 S.W.2d 527, 528 (Tex. App. – Waco 1984, pet. ref'd); *Klein v. State*, 662 S.W.2d 166, 170 (Tex. App. – Corpus Christi 1983, no pet.). Appellant admitted he was told to leave the hallway of the office building, an area outside the clinic. He admitted entering the clinic, but denied he was told to leave the clinic. The information alleged appellant entered Leslie Moore's property and remained there after receiving notice to depart. Moore was the clinic manager. There was no evidence the hallway was her property. By denying that he received notice to leave the clinic, which was Leslie Moore's property, appellant denied the offense. Tex. Penal Code Ann. § 30.05(a)(2) (Vernon 1974.) Thus, he was not entitled to the instruction.

Second, there was no evidence appellant reasonably believed his conduct was immediately necessary to avoid

imminent harm to the other trespassers, as required by section 9.22. There is no evidence of harm, imminent harm, attempted harm, or threatened harm to the other trespassers. Appellant admitted this. Nevertheless, he testified he feared harm because on two other criminal trespasses at other locations, other people had poured dirt and cold water on the trespassers. The mere possibility of harm will not support a jury instruction on necessity. *Boushey v. State*, 804 S.W.2d 148, 151 (Tex. App. – Corpus Christi 1990, pet. ref'd); *Bobo v. State*, 757 S.W.2d 58, 63-64 (Tex. App. – Houston [14th Dist.] 1988, pet. ref'd), *cert. denied*, 490 U.S. 1066 (1989); *Schermbeck v. State*, 690 S.W.2d 315, 317-18 (Tex. App. – Dallas 1985, no pet.). A generalized fear of harm does not constitute a reasonable belief that conduct is "immediately necessary to avoid imminent harm." Section 9.22.

Point of error one is overruled.

In point of error two, appellant contends he was unfairly surprised because, in a prior trial of this case, the judge gave an instruction on necessity, but he denied one in this trial. The right to a necessity instruction depends solely on the evidence heard at this trial, not at any prior trial. Appellant's expectation to the contrary is not supported by law.

Point of error two is overruled.

Appellant next asserts the trial court erred by instructing the jury it could convict him under the law of parties because the information did not allege he acted as a party. No such allegation is required. *Crank v. State*, 761 S.W.2d 328, 351 (Tex. Crim. App. 1988).

The third point of error is overruled.

Appellant's fourth point of error asserts the trial court committed fundamental error by giving a jury instruction on parties that extended his criminal liability "beyond the criminal trespass charged to a different criminal trespass offense committed possibly by other persons."

This complaint was not raised in the trial court. Non-preserved jury charge error requires great harm to merit reversal. *Gibson v. State*, 726 S.W.2d 129, 133 (Tex. Crim. App. 1987) (op. on reh'g). The harm must be "egregious" and deny the defendant a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1985) (op. on reh'g).

We overrule this point because appellant has not demonstrated either error or harm. The purpose of the law of parties is to allow a defendant to be convicted for helping others commit crime. Tex. Penal Code Ann. §§ 7.01, 7.02, 7.03 (Vernon 1974). The jury charge applied the law of parties to the particular facts alleged and proved at trial, by allowing appellant's conviction if he helped three juveniles trespass on property owned by Leslie Moore in Harris County on March 24, 1990. The instruction did not deny appellant a fair trial.

The fourth point of error is overruled.

In appellant's fifth point of error, he asserts the trial court erroneously denied his fourth motion to quash the information. The motion contended the State could not use the law of parties at trial because it was not pled in

the information, thus depriving him of notice. We overrule this point of error for the same reasons we overruled point three. In addition, the motion was untimely. Appellant filed his motion on November 26, 1990 and presented it on November 27, 1990, the day of trial. Filing such a motion does not preserve error; the motion must be brought to the trial court's attention before the day of trial. *Van Dusen v. State*, 744 S.W.2d 279, 280 (Tex. App. – Dallas 1987, no pet.); TEX. CODE CRIM. P. ANN. art. 1.14(b) (Vernon Supp. 1991). Appellant did not do so.

The fifth point of error is overruled.

The seventh point of error asserts the trial court erred by denying motion to quash number one, i.e., that the information failed to allege criminal trespass because it failed to allege that notice to depart was given by the property owner.

The State is not required to allege that the property owner gave notice to depart. The Fourteenth Court of Appeals has stated:

> Although § 30.05(b)(2)(A-C) further defines "notice," we are not aware of any authority, either case law construing § 30.05, or provisions of the Code of Criminal Procedure, which would categorically require the State to allege the *means* of notice in order to sufficiently charge the accused.

Bobo, 757 S.W.2d at 61 (emphasis in original); *see also Erlandson v. State*, 763 S.W.2d 845, 850 (Tex. App. – Houston [14th Dist.] 1988, pet. ref'd), *cert. denied*, 110 S.Ct. 152 (1989). The State was not required to plead evidentiary facts. Therefore, the trial court did not err.

Point of error seven is overruled.

In appellant's eighth point of error, he asserts the trial court erred when it denied motion to quash number two, i.e., that the information failed to allege the location of the property involved with sufficient certainty for double jeopardy protection, as required by TEX. CODE CRIM. P. ANN. arts. 21.04, 21.09 (Vernon 1989).[1]

Article 21.09 applies only to real estate that is the object of the offense. It does not apply to real estate alleged only as the location of the offense. *Franks v. State*, 688 S.W.2d 502, 504 (Tex. Crim. App. 1985). Trespass is an offense against the owner's possession and control of property, not an offense against the property itself. *Reed v. State*, 762 S.W.2d 640, 645 (Tex. App. – Texarkana 1988, pet. ref'd). Alleging that the offense occurred on March 24, 1990, in Harris County, Texas, on Leslie Moore's property is sufficient. *Id.*

The eighth point of error is overruled.

In appellant's sixth point of error, he asserts the trial court erred by not giving him credit on his sentence for time he claims he spent in jail before trial.

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[1] Section 21.09 states the requirments [sic] for describing property in an information and provides, in pertinent part: " . . . If the property be real estate, its general locality in the county, and the name of the owner, occupant or claimant thereof, shall be sufficient description of the same." TEX. CODE CRIM. P. ANN. art. 21.09 (Vernon 1989).

Section 21.04 provides: "The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense." TEX. CODE CRIM. P. ANN. art. 21.04 (Vernon 1989).

Appellant made no such complaint in the trial court. Thus, nothing is presented for review because he failed to comply with TEX. R. APP. P. 52(a). Furthermore, appellant has not filed the statement of facts from the punishment stage, the sentencing, or any post-trial proceedings where evidence may have been heard on this issue. It is the appellant's burden to present a record "requiring" reversal. TEX. R. APP. P. 50(d). Absent a complete statement of facts, we must presume the evidence supports the judgment. The State contests appellant's claims, and the record is unclear. Appellant has included in the transcript documents from other cases. We decline to consider them because they are not properly before us. *Farris v. State*, 712 S.W.2d 512, 515 (Tex. Crim. App. 1986).

The sixth point of error is overruled.

The judgment is affirmed.

/s/ Murry B. Cohen
Murry B. Cohen
Justice

Chief Justice Trevathan and Justice O'Connor also sitting.

Publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered DEC 19 1991
True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

APPENDIX "B"

[SEAL]

COURT OF APPEALS

FIRST DISTRICT OF TEXAS

COPY OF JUDGMENT

WAYMAN HENRY CHUNN,
APPELLANT

NO. 01-90-01120-CR V.

THE STATE OF TEXAS,
APPELLEES [sic]

Appeal from the County Criminal Court at Law No. 4, Harris County, Texas. (Tr. Ct. No. 9011667). Opinion delivered by Justice Murry B. Cohen, Chief Justice Trevathan and Justice O'Connor sitting.

"The cause came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged, and decreed by the Court that the judgment be in all things **AFFIRMED,** and that the appellant pay all costs in this behalf expended and that this decision be certified below for observance."

Judgment entered December 19, 1991.

STATE OF TEXAS
COUNTY OF HARRIS

I, Kathryn Cox, Clerk of the Court of Appeals, First Supreme Judicial District, Houston, Texas do hereby certify that the foregoing is a true and correct copy of the criminal record, as appears of record in Vol. 26, Page

1965 Minutes of said Court on file in my office.

Witness my official hand and seal of office this 10th July 1992

KATHRYN COX, CLERK OF COURT
First Supreme Judicial District
Houston, Harris County, Texas.

By M. Thompson Deputy

APPENDIX "C"

[SEAL]

In The

COURT OF APPEALS

For The

FIRST DISTRICT OF TEXAS

NO. 01-90-01120-CR

WAYMAN HENRY CHUNN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law #4,
Harris County, Texas
Trial Court Cause No. 9011667

ORDER

On this day came on to be heard appellant's motion for rehearing. And such motion is hereby **OVERRULED.**

PER CURIAM

Panel: Justices Trevathan, Cohen O'Connor

Order entered January 23, 1992.

Kathryn Cox, Clerk of the Court

APPENDIX "D"

May 6, 1992
COA#: 01-90-01120-CR

(SEAL) (INK STAMP) OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

(POSTMARK and POSTAGE)

RE: Case No. 0277-92
STYLE: CHUNN, WAYMAN HENRY

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: RICHARD W. SCHMUDE
PO BOX 674
TOMBALL TX 77375